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William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Docket No. 96-152

Enforcement of Section 275(a)(2) of the Telecommunications Act of 1996 Against Ameritech Corporation, CCB Pol 96-17

Dear Mr. Caton:

In response to a question posed by the Commission, the Alarm Industry Communications Committee ("AICC") submits the following additional information in the above dockets. In its ongoing campaign to persuade the FCC to nullify Section 275(a)(2) of the Act, Ameritech has sought to focus the Commission's attention on everything except the obvious context and meaning of the law itself. Previously claiming that hostile takeovers and tax avoidance were on the Congressional mind at the passage of Section 275, Ameritech now contends that contract law principles are both relevant to this proceeding and supportive of its contention. AICC welcomes the opportunity to demonstrate that both of these claims are erroneous.

As to relevance, contract law principles are so attenuated from the meaning and purpose of Section 275 as to be wholly meaningless in this docket. Like charity, statutory interpretation properly begins at home. When interpreting a statute, the Commission must always look first to the language, structure and context of the law. In determining the general purpose and intent of a statute, then, an agency or court must look initially to the

plain language of the law. If that examination is insufficient, the review secondarily turns to the legislative history. Where even that inquiry fails to produce a clear meaning, the intent of the statute is sought in its overall structure and context, with care being given to ensure that each of the law's parts is given meaning. Only where all these efforts fail do extrinsic aids become even marginally relevant.

The Supreme Court has made clear that statutory interpretation is a "holistic endeavor," which must give effect to the statute's full text, language, structure and subject matter. *National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 113 S.Ct. 2173, 2182 (1993). The analysis should take the whole of the provision into account: "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *see also, Sutherland Statutory Construction*, § 46.05 (5th ed. 1992) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.").

Extrinsic aids to construction, like those Ameritech has suggested in this case, are attenuated sources consulted only if meaning cannot be determined from a holistic reading of the relevant statutory provision. Ameritech's attempts to draw analogies from unrelated statutes and legal contexts are useless indicators of Congress' intent in passing Section 275 of the Act. Commenters have noted that such sources are considered an "unreliable means of discerning legislative intent." *Sutherland*, § 53.05.

In the case of Section 275(a)(2), there is no need to reach extrinsic matters. When viewed in its plain meaning as an exception to the five-year ban on BOC provision of alarm monitoring services contained in Section 275(a)(1), it is clear that Section 275(a)(2) is focused on limiting Ameritech's growth by acquisition (<u>not</u> merely dictating the legal form of that growth). Moreover, but for the individual statements of two representatives from Ameritech states, the legislative history (and Congressional filings in this docket) indisputably bars asset purchases by Ameritech. Further, the overall structure and context also belies the Ameritech reading because it fails to give meaning to an important part of the statute (the proviso allowing customer swaps) and relies on a tax law theory inconsistent with the Congressional Committees that drafted and reviewed the law (and lacks even one word of support from any source).

In the case of Section 275(a)(2), then, the extrinsic aids Ameritech suggests are irrelevant. The language, structure and context of Section 275(a)(1) clearly demonstrates that Congress intended to preclude RBOC participation in alarm monitoring for five years, a conclusion supported by Ameritech. Because Ameritech had already entered the market prior to the 1996 Act, Congress allowed Ameritech to avoid divestiture of its existing alarm monitoring activities, but adopted Section 275(a)(2) to prohibit it from growing through

acquisition during the five-year RBOC entry prohibition. This intent is confirmed by the inclusion of a customer exchange as the only exception to the ban on Ameritech acquiring financial control of or an equity interest in an unaffiliated alarm monitoring business. Accordingly, because the language, structure and context of Section 275 is clear, the Commission need not resort to extrinsic aids such as contract law analogies.

In any event, even if the Commission were to look outside Section 275 for assistance, contract law doctrines support AICC's position. For example, in situations where a court must determine shareholder rights or the liability of a successor, courts have found the fact that a company structures a transaction as an asset purchase is not dispositive. Applying a doctrine referred to as the "continuity of enterprise" or de facto merger doctrine, courts have treated some asset purchases as equivalent to a merger. *See, e.g., Sweatland v. Park Corp.*, 587 N.Y.S.2d 54 (N.Y. App. Div. 1992); *Gould, Inc. v. A&M Battery and Tire Service*, 1997 WL 16507 (M.D. Pa. Jan. 15, 1997); *Catfish Antitrust Litigation*, 908 F. Supp. 400, 413 (N.D. Miss. 1995); *Farris v. Glen Alden Corp.*, 143 A.2d 25, 31 (Pa. 1958). As one court noted recently, "Where the acquiror corporation purchases all the target's assets, leaving the target as a mere shell, the transaction bears a distinct resemblance to a merger." *Irving Bank Corp. v. Bank of New York*, 140 Misc. 2d 363, 367 (N.Y. County 1988); *cf. Farris*, 143 A.2d at 28 ("to determine properly the nature of a corporate transaction, we must refer not only to all the provisions of the agreement, but also to the consequences of the transaction and to the purposes of the provisions of the corporation law said to be applicable").

Of course, because the policies of the particular applications described above differ from that of Section 275, the analogy is not exact and some factors considered in these cases are not applicable to the present circumstances. Nevertheless, these cases illustrate (1) that under contract law the form of a transaction is not dispositive of its legal significance, and (2) that the policies of the "law said to be applicable" will play a role in determining how a transaction should be treated. Thus, to the extent that the treatment of asset purchases in contract law might guide the Commission, it supports an interpretation that Section 275(a)(2) prohibits asset acquisitions by Ameritech.

Moreover, the contract law materials supplied by Ameritech in an attempt to advance its position are unpersuasive. For example, Ameritech relies extensively on court statements that the transfer of assets does not automatically terminate or dissolve a corporation; in Ameritech's view this means that asset purchases do not acquire an "entity" because the seller's corporate shell remains intact. To reach that conclusion, however, first requires acceptance of Ameritech's other unsupported argument -- that the word "entity" in Section 275(a)(2) is limited to partnerships or corporations. If "entity" can include a division or other unincorporated subset of a company (as was the case with Circuit City), then the continued existence of the corporate shell of the seller company becomes totally irrelevant. And Ameritech has provided no convincing support that "entity" is defined in the narrow

fashion which it advocates. In fact, such a reading of Section 275(a)(2) reduces it to a mere technicality rather than a significant public policy.

Similarly unhelpful to Ameritech are the legal treatises which it cites in its *ex parte* filings. For example, Corporations Volume III, relied on by Ameritech, makes clear that the difference between asset and stock purchases is based only in legal technicalities irrelevant to telecommunications or antitrust public policy. "Consolidations and mergers, as well as sales of the corporate assets, *are generically known* as 'reorganizations.'" James D. Cox *et al.*, Corporations, at 22.8 (italics added). This treatise also states that in choosing between asset sales and mergers, "the sale of assets has been most frequently used as a method of continuing a concern or business under a different corporate financial structure or as part of a larger corporate enterprise." *Id.* at 22.9. These issues may be of importance to the private interests of the buyer and seller, but they are not public policy concerns which would motivate the Congress to differentiate between asset sales and mergers in a statute seeking to establish a national policy against anticompetitive domination of the alarm monitoring business by Ameritech. In fact, quite the opposite, because the form of Ameritech's acquisitions is wholly irrelevant to their anticompetitive impact.

Section 275 is a narrowly focused provision in a 111-page rewrite of the telecommunications laws of the United States. That rewrite necessarily left much implementation and interpretation to the FCC, the expert agency charged with ensuring that the new law fulfills its promise and intent. Unlike courts enforcing contract laws of general applicability, the FCC is an administrative body with a mix of judicial, legislative and administrative powers. The context of such an agency interpreting a specific statute aimed at a set of facts expressly contemplated by the Congress is not readily analogized to courts seeking to apply general contract laws to circumstances not before the legislature at the time the law was passed. However, as the above discussion shows, the *de facto* merger and continuity of enterprise doctrines demonstrate that, where necessary to achieve the purposes of the law, even the limited scope of judicial review permits the treatment of asset purchases as the equivalent of stock sales.

The Commission itself recently recognized the need to focus on the substance of a purchase, rather than its form, in reviewing the valuation methods under the RBOC affiliate transaction rules. The Commission concluded that

> requiring [Ameritech] to use the same valuation methods for both services and asset transfers would also reduce the incentive to record an affiliate transaction as a service transfer, rather than an asset transfer, especially in the context of procurement activities. . . . Requiring [Ameritech] to value transfers of services using the same valuation methods currently used for asset transfers would reduce the carrier's ability to value a transfer so that a carrier can

> pass on to their affiliates any financial advantages flowing from how they choose to characterize the transaction.

Accounting Safeguards Order, FCC 96-490, CC Docket No. 96-150 (released Dec. 24, 1996) at ¶ 146. The same is true in the case of Section 275(a)(2). The law's effectiveness in preventing anticompetitive conduct by Ameritech should not turn on whether Ameritech chooses to structure the purchase as an asset acquisition or a stock merger.

The Commission must not let Ameritech's efforts at distraction and obfuscation prevent it from reading Section 275 as it was obviously intended. The BOCs are barred from alarm monitoring services for five years, and Ameritech's current operations are grandfathered but cannot be expanded by acquisition.

Sincerely,

Danny E. Adams
Counsel to the Alarm Industry
Communications Committee